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In the Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD K. EHRLICH AND LURLINE GARDENS LIMITED DIVIDEND HOUSING PARTNERSHIP, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether vouchers submitted monthly in order to receive interest subsidies from the government constitute "claims" within the meaning of the False Claims Act.

2. Whether the False Claims Act imposes liability on petitioners of one statutory forfeiture for each false claim submitted to the United States on petitioners' behalf, when petitioners had actual knowledge and control over each such submission.

3. Whether, in a suit under the False Claims Act, the government may recover damages that accrued after discovery of the fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 643 F. 2d 634. The opinion of the district court (Pet. App. B1-B8) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1981. The petition for a writ of certiorari was filed on July 14, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners Lurline Gardens, a limited partnership, and Richard Ehrlich, Lurline's sole general partner, obtained a commercial mortgage to finance a low income housing project. The mortgage was insured and partially subsidized by the United States under Section 236 of the National Housing Act, 12 U.S.C. 1715z-1, a program administered

by the Department of Housing and Urban Development (HUD). Under the statute, the insured amount of the mortgage may not exceed 90% of the replacement costs of the project, including construction costs. The subsidy provided under the statute reduces the project sponsor's interest payments to 1% of the amount of the mortgage; hence, the larger the mortgage, the larger the subsidy (Pet. App. A1-A2).

In accordance with routine program procedure, HUD estimated the maximum mortgage for which it would insure petitioners' proposed housing project. Petitioners obtained a mortgage at the estimated amount and, in August 1971, HUD, petitioners, and a mortgagee entered into an "Agreement and Certification" under which HUD was to pay the interest reduction subsidy directly to the mortgagee (Pet. App. A3). Both the Act and the agreement provide for a reduction of the insurable mortgage principal, to be paid by the mortgagor (petitioners) to the mortgagee, in the event that actual costs of construction are smaller than estimated project costs (*ibid.*). Such a reduction of the principal has the effect of reducing the interest subsidy HUD is obligated to pay the mortgagee.

Upon completion of the project in August 1972, petitioners submitted two Certificates of Actual Cost to HUD, one as the mortgagor and one as the general contractor. Both certificates were prepared by petitioner Ehrlich. The certificates overstated construction costs to avoid repaying part of the principal as required by the Act and the agreement. Thus, the false certifications caused HUD to insure a larger mortgage and pay larger interest subsidies than those authorized by the Act or required under the agreement. Ehrlich also certified falsely that there was no identity of interest with any subcontractor on the project although he was the sole owner of one subcontractor (Pet. App. A4).

Pursuant to the agreement, HUD paid monthly interest reduction subsidies to the mortgagee upon the receipt each month of a "voucher" or "statement" prepared by the mortgagee.[1] Each voucher stated whether the mortgagor (the partnership) was in default and the amount of the interest reduction payment due. Seventy-six such vouchers were submitted by the mortgagee to HUD, causing HUD to make 76 subsidy payments totalling $995,264.22. Had petitioners not inflated their actual costs, HUD would have paid the mortgagee $70,068.72 less in interest reduction payments (Pet. App. B5).

In 1975, based on these events, petitioner Ehrlich pleaded guilty to two counts of an indictment charging him with submitting false claims to an agency of the United States, in violation of 18 U.S.C. 1001. Ehrlich admitted knowingly and intentionally inflating construction costs. In April 1978, HUD demanded that the partnership pay the excess principal due the mortgagee under the agreement, but the partnership refused to do so (Pet. App. A4).

In May 1978, the United States brought this suit in the United States District Court for the Central District of California to obtain specific performance of the agreement, *i.e.*, reduction of the mortgage principal, and to obtain damages under the False Claims Act, Rev. Stat. 3490, 3494, and 5438 (1871 ed).[2] The district court granted the United States full relief upon motion for summary judgment, including forfeitures of $2,000 for each of the 76 vouchers submitted to HUD by the mortgagee (Pet. App. A4-A5).

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[1]The monthly "vouchers" referred to here have been so labeled throughout this litigation. In the petition, however, petitioners have changed this nomenclature to "statements" (Pet. 14 n.*).

[2]The False Claims Act is codified at 31 U.S.C. 231 *et seq.*, but that version has not been enacted into positive law. See *United States* v. *Bornstein*, 423 U.S. 303, 305-307 n.1 (1976).

The court of appeals affirmed the district court's judgment in all respects (Pet. App. A1-A14). Judge Canby dissented only with respect to the number of forfeitures that could be assessed (*id.* at A14-A17).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 14-16) that the vouchers submitted by the mortgagee to HUD are not "claims" within the meaning of the Act. This contention is without merit. This Court has recognized that "the [False Claims] Act is broadly phrased to reach any person who makes or causes to be made 'any claim upon or against' the United States." *United States* v. *Neifert-White Co.*, 390 U.S. 228, 232 (1968). Indeed, the Act "reaches beyond 'claims' * * * to all fraudulent attempts to cause the Government to pay out sums of money." *Id.* at 233. Thus, the statute specifies that the submission of "any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition" may be grounds for liability. Rev. Stat. 5438 (1874 ed.). The requirement is simply that the false statement has "the purpose and effect of inducing the Government immediately to part with money." 390 U.S. at 232.

This requirement clearly was met in this case. The vouchers here were a necessary prerequisite to payment. HUD regulations provide that "[t]he interest reduction payments * * * shall be paid upon the receipt of a billing * * * from the mortgagee." 24 C.F.R. 236.515. The mortgagee submitted this billing or voucher monthly on behalf of petitioners and thereby obtained the interest reduction

payments from HUD. Thus, the courts below correctly concluded (Pet. App. A8, B7) that the vouchers were false claims within the meaning of the Act.[3]

2. Petitioners contend (Pet. 16-19), relying on *United States* v. *Bornstein*, 423 U.S. 303 (1976), that they cannot be held liable for 76 forfeitures based on the 76 claims submitted to HUD by the mortgagee. Instead they assert that they can be subjected only to one forfeiture because they submitted false information only once, on the Certificates of Actual Cost. As the court of appeals explained in detail (Pet. App. A8-A11), however, its decision is fully consistent with *Bornstein*.

In *Bornstein*, this Court considered a subcontractor's liability for forfeitures in a case in which the subcontractor supplied mislabeled parts to the prime contractor, who incorporated them into a finished product that was furnished to the government. The subcontractor submitted three shipments of parts to the prime contractor, each of which was accompanied by a separate invoice, and the prime contractor forwarded 35 separately invoiced shipments to the government. Recognizing that "the statute imposes liability only for the commission of acts which cause false claims to be presented" (423 U.S. at 312), the Court held that the number of forfeitures is not necessarily determined by the number of claims ultimately presented by the innocent prime contractor; rather, it requires examination of "the specific conduct of the person from whom the

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[3]Petitioners mistakenly claim (Pet. 15) that the decision below is inconsistent with *United States* v. *Cohn*, 270 U.S. 339 (1926), and *United States* v. *McNinch*, 356 U.S. 595 (1958). As this Court explained in *United States* v. *Neifert-White Co.*, *supra*, 390 U.S. at 230-232, those decisions simply held that no "claim on or against the Government" was presented on the particular facts before the Court. Unlike those cases, however, here the vouchers induced the United States "immediately to part with money" (390 U.S. at 232) in the form of interest reduction payments and thus constitute claims within the meaning of the False Claims Act.

Government seeks to collect the statutory forfeitures." 423 U.S. at 313. On the facts of that case, the Court held the subcontractor liable for three forfeitures, noting (423 U.S. at 312; emphasis added):

> The fact that [the prime contractor] chose to submit 35 false claims instead of some other number was, so far as [the subcontractor] was concerned, wholly irrelevant—*completely fortuitous and beyond [the subcontractor's] knowledge or control.*

The situation here is quite different. Petitioners *knew* that, because of petitioners' false certifications, the mortgagee submitted monthly claims to HUD for interest reduction payments that exceeded the amount permitted by statute. Indeed, because the vouchers reported each month that the mortgagor was not in default, they depended on petitioners' payment each month of their obligations under the agreement. Moreover, it was completely within petitioners' *control* to prevent the submission of each of the 76 claims. At any time, they could have honored the covenant in the agreement to reduce the excess mortgage amount, thereby reducing each interest reduction payment to the correct figure. By refraining each month from performing their contractual obligations under the agreement, petitioners knowingly caused the submission of a false claim to the United States by the mortgagee. Furthermore, unlike the *Bornstein* defendants, petitioners continued to derive a benefit from the submission of additional vouchers. While the subcontractor in *Bornstein* had no stake in the number of claims presented by the prime contractor, petitioners here benefitted from an inflated interest subsidy paid each month as a result of the presentation of each monthly voucher, the payment of which also prevented their mortgage from going into default.

In these circumstances, it is fully consistent with *Bornstein*, and in accordance with the purposes of the False

Claims Act, to penalize petitioners, not for the mortgagee's actions in submitting the vouchers, but for petitioners' own actions in engineering and continuing to assure the presentation of the false vouchers. Moreover, petitioners point to no decision of another court that is even arguably inconsistent with the decision below. Accordingly, the decision of both courts below that petitioners are liable for 76 civil forfeitures does not warrant review by this Court.

3. Petitioners also contend (Pet. 19-22) that the United States was dilatory in bringing this suit and that damages suffered after the false claim has been exposed may not be recovered under the False Claims Act. This contention is insubstantial. The Act contains a specific, six-year statute of limitations, which petitioners do not claim was violated. Apart from this restriction enacted by Congress, petitioner points to no authority imposing a time bar to the recovery of damages under the False Claims Act.

Moreover, even assuming arguendo that the United States has an affirmative obligation to mitigate damages in suits brought under the Act, it could not have done so in the circumstances of this case. Although petitioner Ehrlich's guilty plea in 1975 indicated that the amount of the insured mortgage was too large, the United States was not relieved of its obligations under the agreement. Had the United States withheld the interest reduction payments it contracted to pay the mortgagee, it would have risked contractual liability to the mortgagee for the interest payments and government liability as insurer of a mortgage in default. Therefore, the United States had no choice but to continue making payments and incurring damages, which clearly were sustained "by reason of" petitioners' conduct.[4]

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[4]Petitioners also contend (Pet. 22-25) that summary judgment was inappropriate here because certain factual questions remained in dispute. This factual contention was correctly rejected by both courts

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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below, and it does not warrant review by this Court. As the court of appeals explained (Pet. App. A5-A6, A14), the alleged unresolved factual questions identified by petitioners cast no doubt on the judgment below and provide no reason for the district court to have refused to grant summary judgment.

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